United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Henry W. Hodges

In the Court of Appeals of the District of Columbia.

THE LAS OVAS COMPANY, (INCORPORATED),
Appellant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS,
Appellees,
} No. 2030.

and

NORMAN H. DAVIS and CHARLES T. PHILLIPS,
Appellants,
vs.
THE LAS OVAS COMPANY, (INCORPORATED),
Appellee.
No. 2033.

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BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

In December, 1903, or January, 1904, the defendants, Davis and Phillips, residing at the time in Cuba, secured an option to purchase about four thousand acres of land in Cuba for $10,000. They met Benjamin Micou in Havana and told him of the property. Micou told them he thought he could interest some people in the property. Davis and Phillips came to Washington and Micou introduced them to Geo. C. Reid. The latter joined them in a syndicate to form a corporation to take over the prop-

erty. An agreement was entered into (Printed record, p. 47) early in February, 1904, which, after reciting that Davis, Phillips, and Herbert and Micou (a partnership composed of Hilary A. Herbert and Benjamin Micou) had an option on 4,000 acres of land in Cuba, provided that these parties and Reid would form a corporation for taking over and exploiting the land. That Davis, Phillips, and Herbert and Micou could acquire the land for a company, to be organized, for $25,000 in money, and 40 per cent of the stock of the company. The capital stock of the company was to be $150,000, each share to be of the par value of $1,000. Forty per centum of the stock of $60,000 was to go to Phillips, Davis, and Herbert and Micou, as compensation for securing the land and the preliminary work of getting up and incorporating the company. The remainder of the stock, viz., $90,000, was to be disposed of for one-third of its face value, or $30,000, one-half to be paid in cash, and balance at the end of the year, if necessary. The agreement also provided that of this $90,000 of stock, Davis would take ten shares, Phillips ten shares, and Reid thirty shares, and, if desired by the persons subscribing to $60,000 of this $90,000, Herbert and Micou, Davis and Phillips would take the remaining $30,000, each taking $10,000. The agreement further provided that some one should be sent to Cuba to examine the land and investigate the title, and, if either the title was not good or the land not suitable for the purposes intended, Davis and Phillips should bear the expense. The agreement in the record is marked duplicate, the original was signed by Herbert and Micou through Micou (printed record, p. 86). After the above agreement was entered into, Davis, Phillips, and Micou went to Richmond, Virginia, hoping to interest a friend of Micou's in the enterprise. There,

on February 5th, 1904, Davis, Phillips, and Herbert and Micou entered into an agreement, drawn up by Micou, (Printed record, p. 87) by which Davis and Phillips were to receive two-thirds, and Herbert and Micou one-third of all over $15,000, paid by the company, to be formed, for the property, whether money or stock. The agreement is as follows:

"The Jefferson, Richmond, Virginia.

Richmond, ———, 190—.

Whereas there is now under consideration the organization of a corporation to acquire, develop and dispose of land in Cuba for orange growing and other purposes and the parties to this agreement who purpose bring stockholders in said corporation have agreed or will agree with the other proposed stockholders of said corporation to acquire for and deliver to the corporation when organized for $25,000 some 4,000 acres of land, part of what is known as the Las Ovas tract in Pinar del Rio Province, Cuba, and whereas Charles T. Phillips and Norman H. Davis have an option on this land for $15,000, it is hereby agreed between Charles T. Phillips and Norman H. Davis as parties of the first part and H. A. Herbert and Benj. Micou, under the firm name of Herbert & Micou, as parties of the second part that any sum paid in excess of $15,000 paid for this land by the corporation or the subscribers to its capital stock shall be divided as follows: Two-thirds to be divided between the two parties of the first part and one-third to go to the parties of the second part Should the parties to this contract take stock in the corporation instead of money for the whole or any part of the ——— except over $15,000, to be paid by the corporation for this land then that such stock is likewise to be divided two-thirds between the parties of the first

part and one-third to the parties of the second part. Agreed upon this 5th day of February, 1904.

(Signed) NORMAN H. DAVIS,
CHAS. T. PHILLIPS,
HERBERT & MICOU,
By BENJ. MICOU."

(Printed Record, p. 87.)

They afterwards secured the right to take an additional one thousand acres for $9,000, and they let the company, afterwards formed, have it without any profit. (Record, p. 51.)

Micou went to Cuba to examine the property and have the title looked after. Reid himself, also went, and, after a thorough examination, another agreement was entered into, between a syndicate composed of Reid, Davis, Phillips, and Herbert and Micou on the 19th day of March, 1904 (Printed record, p. 90).

This agreement, superseding the first one, provided that Davis, Phillips, Reid, Hilary Herbert and Benjamin Micou, as Herbert & Micou, would purchase the above five thousand acres, more or less, that they would acquire it for a company to be organized for the sum of $34,000, and 40 per cent on $60,000 of the stock of the company. That of the $90,000 or ninety shares of the stock remaining, Reid would subscribe for 35 shares, Phillips for 22 shares, Micou for 17 shares, Davis for ten shares, and the remaining 6 shares were set apart for a Captain Billings, and if the latter did not take them, the said syndicate would take them in proportion to their holdings, the members to pay pro rata for the stock a sufficient amount to pay for the property and provide an expense fund of $5,000.

The first agreement, above was that Davis, Phillips and Herbert and Micou should have all the 40 per cent, which the company was to give for the property, but, when Reid got to Cuba, he required that he should have a part, and so, under this last agreement, this 40 per cent was divided into four parts instead of three, Reid getting $15,000, Davis $15,000, Phillips $15,000, and Herbert and Micou $15,000. Thus every one interested at the time, (Billings never came in), divided equally this 40 per cent. This stock is spoken of sometimes as promoters' stock, sometimes as non-assessable stock. Herbert and Micou, through Micou, were parties to every agreement. Hilary A. Herbert, the other partner, actually had some of the stock profit at the institution of this suit. His partner, Micou, for the firm, also received something of the cash difference, between what was paid the owner for the property, and what was paid by the syndicate on their stock.

After the last agreement, Davis secured a valuable lake property, adjoining the above for the sum of $1,000. This also he turned into the company afterwards formed, without profit, making the whole money consideration $35,000. Billings did not come in and Davis took this six shares. Thus every share of stock was taken by the syndicate themselves.

Davis sold and had these six shares transferred to Dr. Z. T. Sowers, on May 13th, 1904, making a profit on them, the company not having been chartered at this time. Application was made for a charter for the company and it was chartered early in June, 1904.

The Auditor, in his report (Printed record, p. 235), finds that Davis and Phillips received a money profit of $6,894, but, in arriving at this, he charges them with $1,333, that Davis made on the sale of stock to Dr.

Sowers. Phillips had nothing to do with this sale. It was a matter entirely between Davis and Sowers. Nor did the after formed company have anything to do with it. He also charged Davis and Phillips with $1,200 received from Micou, with which the company had nothing to do. The title to the property was taken from the original owner to a man named Escalante and from him to Micou, who in turn conveyed to the company, when organized.

The stockholding at the time of the bringing of this suit, was as follows:

General Reid, 74 shares; Reid's secretary, Kane, 1 share; Reid's son, 1 share; Dr. Sowers, 6 shares; Col. Hilary A. Herbert, 9 shares; Davis, 49 shares, in the treasury of the company 10 shares, which one of the syndicate had received and transferred to third parties, but were not paid for.

Phillips, one of the defendants, disposed of all his stock, except 7 shares, before this suit, and sold Davis this 7 shares, after suit, and so holds no stock.

Of the stock held by Davis, 25 shares are promoters or non-assessable, and 24 shares assessable. The Auditor only gives him 22 shares of non-assessable stock, but there is no doubt that the Auditor is in error. (See printed record, pp. 99-100 and 197). Davis so testifies and Reid though called in rebuttal does not deny it, as he would undoubtedly have done, as he had all the stock books of the company and the transfers. This will be fully explained, however, in the argument.

When General Reid found out that Davis, Phillips, and Herbert and Micou had made some cash profit on the land, a special meeting of the directors was called. Davis, who was a director, was not notified of this meeting, though he had been notified of all prior meetings. The meeting

was adjourned to May 23rd, 1905. There were present, General Reid, his son Conrad Reid, his son-in-law Frank A. Kane and Dr. Sowers. They resolved to employ counsel. Another special meeting of the board was called May 28, 1905, of which no notice was given Davis. There were present, Reid, his secretary Kane. Dr. Sowers, and Hilary A. Herbert, the latter of whom stood in exactly the same position as Davis and Phillips, and had shares exactly as they did, through his firm of Herbert & Micou, and the only stock he held was what he had received as a member of the syndicate. It was resolved to employ counsel to take action. The result was this suit, in which it it sought to hold Davis and Phillips, and leave out entirely Herbert and Micou.

Errors Assigned.

1. The refusal of the Court to strike the bill from the files and quash the writ of subpoena.

2. The requiring the defendant Davis to surrender twenty-seven shares of stock to be cancelled, and to pay $1,546.54 with interest.

These general assignments of error, to avoid repetition, will be subdivided in the argument.

The Corporation Has Not Brought This Suit.

The first error assigned is the refusal of the Court to dismiss the bill.

The first ground urged upon the trial court for dismissing the bill was because the suit was not legally authorized.

The suit was directed at a special meeting of the board of directors, of which Davis, who was a director, was

given no notice. He was given notice of all other meetings except the two special meetings held with reference to taking action against him.

The law is well settled that no action of a special meeting of a board of directors is valid unless all the directors are notified, even though the presence of the absent could not have changed the result.

Mr. Thompson, in his work on the Law of Corporations, recognized as one of the best authorities on the subject, Vol. 3, Sec. 3936, says:

> "When the meeting is a stated one the time and place of which is fixed by some by-law or regulation, no notice of it is necessary, but when it is a special or called meeting, all the members must be notified of it. * * * The right of all the directors to notice is founded on the right of being present for the purposes of consultation, of which right a minority cannot be arbitrarily deprived by a majority. It follows that proceedings at a special meeting held by a bare majority of the members of a board of directors of a corporation, without notice to the other members, are void, although all those present voted in favor of the action taken, and the result would have been the same had the other members been present."

It is true Davis had given Reid a power of attorney to represent him at meetings of directors, but this did not avoid the necessity of notice, for several reasons.

1. Such power of attorney is a nullity. Thompson on Corporations, Vol. 3, Sec. 3909:

> "A power of attorney from one director to another to represent him at meetings of the board is illegal and void."

Idem, Vol. 3, Sec. 3925:

> "It is not competent for a majority of the board to exclude a minority, or even a single member; and it would seem equally to follow that, after such an unlawful exclusion, there is no board remaining which is competent to act so as to bind the corporation, in the absence of circumstances of estoppel" (*i. e.*, estoppel by some act of the corporation).

2. A power of attorney from Davis to Reid, even if valid, could not be used by Reid in such a matter as a suit against Davis. Such use could not have been intended by Davis, and would be a fraudulent use of the same.

3. The power of attorney had never been considered or acted on as rendering it unnecessary to send notice to Davis of meetings, but only to represent him, if absent. Notice had been sent him of every meeting prior to these.

The trial judge, in his opinion, took the ground that the power of attorney was a waiver on Davis' part and that he was estopped.

Upon what ground is Davis estopped? Can the human mind conceive that Davis ever dreamed that the power of attorney could or would be used to bring suit against him?

The law is that any special meeting held without notice to a member is a nullity.

Not only this, but it was never, before these meetings, considered that Davis should not be notified. Notice was, always, before this, sent him. The power of attorney was only to represent Davis, if not present. He was entitled to notice, so that he could be present, if he

desired. The power simply authorized Reid to represent him at meetings, if absent. It in no way waived his right to notice, which he continued to receive, until these meetings.

Again to fail to notify Davis, and authorize suit against him, and leave out his partner in the enterprise, Herbert, who took part in the meeting, though he was equally liable with Davis and Phillips, because Herbert was Reid's intimate friend, was not only inequitable and unjust, but was a fraud on Davis.

Reid, who controlled the company and its directory, at the time of the meeting, and for nearly a month after, was writing Davis most intimately and friendly letters, (Printed record, p. 150-151) and yet he had authorized suit against Davis, and kept his friend Herbert out of it.

As Mr. Thompson says, each director is entitled to be present and have a chance of discussion.

His proxy to represent him, is only in case he is not present. It cannot be treated as a waiver of notice. His right to notice and to be present is one thing. His proxy to represent him, if not present, is another and different thing.

Herbert and Micou Should Be Parties.

The second ground urged for the dismissal of the suit was the failure, and, though the evidence and proceedings showed the propriety and necessity, the refusal of the plaintiff to make Hilary A. Herbert and Benjamin Micou, composing the firm of Herbert & Micou, parties defendant.

There is no question, no dispute, that Herbert and Micou, participated with Davis and Phillips in all profits, secret and otherwise. (See agreement above in the statement of case.)

If there is any liability, it is due from Herbert and Micou equally, as from Davis and Phillips. Herbert and Micou disposed of their stock, except $9,000 non-assessable still held by Herbert, some being bought by Davis and some by Reid. Under the decree entered, even the stock Davis bought from Herbert and Micou is directed to be cancelled and redounds to the benefit of the $9,000 held by Herbert, though the plaintiff treats Herbert and Micou as free from blame. Concisely stated, Davis, Phillips and Herbert and Micou receive certain profits, in stock and money. The stock of the company is in part assessable, in part not assessable. Davis buys some of Herbert and Micou's stock of both kinds. Reid does the same. Davis and Reid also buy all of Phillips' stock. The cash profit, which was the only secret profit received, divided between Davis, Phillips, Herbert and Micou. Herbert and Micou reside within the jurisdiction of the Court. Herbert still holds $9,000 of stock he received of the profits.

The decree required Davis to surrender for cancellation, $27,000 of stock, part of which he bought of Herbert and Micou, and to pay $1,546.54 in cash. Result: Phillips escapes free; Herbert escapes free, Micou escapes free and Davis alone is held. He is required to surrender all the stock he originally held and also all he bought from Phillips and Herbert and Micou. And Herbert, who still holds his profit of $9,000 of stock, actually shares in what is taken from Davis.

Does not the mere statement of the facts show the absolute necessity of making Herbert and Micou parties? Can such an inequitable and unjust decree have the approval of a Court of Equity?

General Reid was a marine officer. Col. Herbert was once Secretary of the Navy. He and Reid are warm

friends. Reid, controlling the company and its directory, seeks to let his friend escape. Will equity aid him, and, in doing so, commit a great injustice? Upon what ground can a Court of Equity allow some of the parties to escape and throw the whole burden on one?

The Judge below, in his opinion, says:

> "Undoubtedly Herbert and Micou would have been proper parties defendant, and, under the Equity practice as it existed in England, prior to the adoption of the 32nd order of August, 1841, would have been necessary parties. This order, however, which is substantially Rule 51, of the Rules of Practice adopted by the Supreme Court for the Courts of Equity of the United States, renders it possible for a plaintiff who has a joint and several demands against several persons, to proceed against one or more of the persons severally liable. What may be the result to the plaintiff in electing to pursue his several remedies against the defendants *is a matter for subsequent consideration.*"

Thus the trial Judge was of opinion that it would have been necessary to have made Herbert and Micou parties, except for Rule 51.

It is not perceived what bearing that rule has on this case.

The rule, clearly, relates only to contract demands. It cannot be tortured into meaning that if several parties have taken and shared in undisclosed profits, some of them can be sued and others left out, when all are within the jurisdiction of the Court.

Certainly in a case of this sort, if only a part are sued, each one can only be held for the profits received by him.

Not counting the $1,333 Davis made on his sale of

stock to Sowers, in which plaintiff was in no way interested and with which Phillips had nothing to do, nor the $1,200 received from Micou, with which the plaintiff had nothing to do, Davis and Phillips received an undisclosed profit of $4,361. (Printed record, 235.)

Thus Davis got $280.50 and Phillips $280.50. Herbert and Micou also received some of the cash undisclosed profits.

As plaintiff refused to make Herbert and Micou parties and make the action joint against all, it is extremely unjust and inequitable to require Davis separately to surrender $27,000 of stock, to pay money in addition. Why should Davis suffer this heavy penalty alone, for the stock is valuable, (Printed record, pp. 216 and 221), and Phillips escape for a small cash sum, and Herbert and Micou escape free?

If the suit can be maintained, Equity and Justice can be done by making them all parties.

The above principles are fully sustained by the authorities.

Thompson on Corporations, Sec. 473:

> "In Equity, the object is to do complete justice to all, therefore *all who concurred in a misapplication of funds in promoting, ought to be charged with the loss and not throw the whole burden on a part.* For otherwise, as was said by V. Chancellor Park, the others who participated in the fraud, would have the benefit of its being brought back."

This is exactly the injustice done in this case. The $27,000 of stock held by Davis, ordered surrendered, and the money ordered to be paid by him adds greatly to the value of the stock held by Herbert.

The Supreme Court has recently said that this cannot be done.

In Old Dominion Copper Mining Company, etc., *vs.* Lewisohn, (May, 1908), 210 U. S., a case, in essential details and substantial facts, exactly like ours, the Court, in affirming the dismissal of the bill, said:

> "Here the members of the syndicate, although members of the corporation, are not joined and it is sought to throw the burden of their act upon a single one."

In Shields *vs.* Barrow, 17 Howard, (U. S.) 130, the general rule as to necessary parties is "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest *or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.*" Approved in Barney *vs.* Baltimore, 6 Wall (U. S.), 280.

In Jessup *vs.* Illinois Cent. R. Co., 36 Fed., 738, the rule is thus stated:

> "If the defendants actually before the Court may be subjected *to a liability under the decree, more extensive or more direct than if the absent parties were before the Court, that of itself will in* many cases furnish a sufficient ground to enforce the rule of making the absent persons parties."

The Corporation Cannot Bring This Suit.

The last ground for the dismissal of the bill is that if Davis and Phillips were promoters, in the legal sense, so was Reid, so was Herbert and Micou.

By the very terms of their agreement they all formed a syndicate to create a corporation and take over the property. The corporation was to give all its stock to those who got the property for it and paid for it. The syndicate was to take all the stock of the corporation. It made no difference to the corporation what the different members of the syndicate subscribed, nor what advantage one got over another. Neither did it make any difference to it what the property cost. The syndicate got all its stock. Six shares being left for Billings if he wanted to come in, and if he did not, the syndicate was to divide it. Billings not coming in, Davis took the six shares, with the knowledge of the other members of the syndicate and had it transferred to Sowers. The corporation had not the slightest interest in the affairs of the syndicate. It got the property. The syndicate got its stock. This was all there was between the corporation and the syndicate. No matter then what may have been said to Reid, one of the syndicate, by Davis, Phillips, or Micou, as to the cost of the property to them, no matter what money secret profit they made, no matter what advantage they may have taken of Reid, no matter what fraud they or any of them may have perpetrated on Reid, it was a matter purely personal to the syndicate, as individuals, and no ground of suit by the plaintiff, a corporation afterwards formed, which lost nothing.

That this is the law; that the plaintiff had no right to bring this suit, has been recently unanimously decided by the Supreme Court, declining to follow the Supreme Court of Massachusetts, which had held another member of the same syndicate, in the same transaction, liable.

The excuse for so fully considering this case, is because the principles established fully cover our case. The opinion was not delivered until some months after the

opinion of the court below and the trial judge did not have the benefit of it.

Old Dominion Copper Mining Co., etc., *vs.* Lewisohn, 210 U. S., 206, (May, 1908).

The facts as alleged in the bill, in the cited case, where the bill was dismissed, and in our case, synoptically stated, were as follows:

1. Cited Case. Bigelow and Lewisohn secured option for the purchase of property.

Our Case. Davis and Phillips secured an option for the purchase of property.

2. Cited Case. Bigelow and Lewisohn formed a syndicate, with the agreement that the money subscribed by the members should be used for the purchase and sale to a corporation to be formed, at a large advance and that the members of the syndicate, in proportion to their subscriptions should receive from the corporation, the profits of the sale in cash and stock.

Our Case. Davis and Phillips took Herbert and Micou in with them on their option, and formed a syndicate with Reid and themselves to form a corporation to take over the property, they to take all its stock, except six shares to be taken by one Billings if he desired to come in, if he did not come in they to take the six shares also. The syndicate agreeing to pay enough on their stock to pay for the property and provide an expense fund of $5,000. Billings not coming in, Davis, with the knowledge of the others, took the six shares, and sold them to Dr. Sowers, on his own account.

3. Cited Case. The corporation was formed and the property put into it, the syndicate receiving most of its stock as agreed upon by the syndicate. 20,000 shares of stock not taken by the syndicate, were subscribed for by

the public at par, the subscribers being ignorant of the large profit made by the syndicate.

Our Case. The corporation was formed and the property put into it, the syndicate taking all its stock, as agreed upon between them. The corporation had no stock left and, of course, none was ever subscribed for by the public.

N. B. The large subscription by the public, after the corporation was formed, made a much stronger case for the corporation to sue for them than ours, where there were no subscriptions to stock except by the syndicate, who took it all, under their agreement.

4. Cited Case. The corporation paid about twice as much as the property was worth.

Our Case. About the same allegations.

5. Cited Case. That Bigelow and Lewisohn received and divided between them, about $20,000 of the stock, without the knowledge of the syndicate.

Our Case. That Davis and Phillips received a cash difference between what was paid the owner for the property, and the price at which the syndicate put it into the company, without the knowledge of Reid, the other member of the syndicate.

The Court, after stating that a similar bill had been upheld by at least one Court, but that the decisions were not in harmony and that there was no authority binding on it, held that the bill was properly dismissed.

The Supreme Court declined to follow the decisions the learned trial Judge followed.

On facts, stronger for relief in the name of the corporation, than in our case, because the innocent public subscribed for stock after the company was formed, the Supreme Court said:

"At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. If there was a wrong, it was when the innocent public subscribed. * * * For it is only by virtue of the innocent subscribers' position and the promoters' invitation that the corporation has any pretense for a standing in Court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and they did, we do not see how the company could maintain this suit. If it could not then, we do not see how it could now. * * * If we are to leave technical law on one side, and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. * * * Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. *Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn, on the agreement with them, as the petitioner believes, is immaterial to the corporation.* * * * *Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate.*"

This case fully covers our case and is sustained by the authorities.

Morwitz, on Corporations, (2nd Edition), Sec. 292.

When directors issued the whole stock of the

company for property worth less than the par amount, no one is injured in the least.

Cook, Corporations, (6th Edition), Sec. 651, p. 1886.

Blum *vs.* Whitney, 185 N. Y., 232, (1906).

When all the stock of the company is turned into another company, in exchange for the stock of the latter, and the promoters are the only ones interested, though the stock is afterwards sold, the promoters cannot be held. The Court said:

> "They dealt wholly with themselves, as sellers and buyers, organizers and corporation. *If fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured.*"

This is exactly what is alleged in our case, viz.: That Davis and Phillips and Micou deceived Reid, one of the syndicate, as to the price the property cost them.

Idem, Sec. 651, p. 1888. Stratton's, etc., *vs.* Dines, 126 Fed. Rep., 968, (1904), Aff'd 135, Fed. Rep., 449.

When all of the stock of a corporation is issued in payment for property, the vendor cannot be held liable for misrepresentations as to the value of the property.

See also Foster *vs.* Seymour, 23 Fed., 65.

Not a single one of the cases, cited by the lower Court in its opinion, is like our case. In them, a number of subscribers were brought in, outside of the syndicate. Not one of them was where all the stock of the corporation was taken by the syndicate.

The allegation in our case was that some of the syndicate deceived one of the others, as to what the property was really costing. Nearly every one of these cases was directly opposed to the Supreme Court decision above.

Auditor's Report.

The second assignment of error is to the relief granted, even if the corporation could maintain its suit.

1st. Davis and Phillips are charged, as a part of secret profits, with $1,333, that Davis made on the sale to Sowers. The company had nothing to do with this. Phillips had nothing to do with and yet is partly charged with it. Davis took the six shares, set apart for Billings, and then sold them to Sowers. Sowers paid for the benefit of the company, exactly what Davis or any one else would have paid on these six shares, and so certainly the corporation has no rights from this transaction, it being in no way a party to it and not losing one cent by it.

> Moriowitz, on Corporations, (2nd Edition), Sec. 290-292.

If the person to whom the stock is first issued afterwards sell it and deceives the purchaser, he has an individual action for damages, and must sue individually.

> Cook on Corporations, (6 Edition), Sec. 651, p. 1886.

2nd. Davis and Phillips are charged with $1,200 received from Micou. What on earth has the plaintiff corporation to do with this? Micou was the acknowledged partner of Davis and Phillips. It was Micou's subscrip-

tion and the company lost nothing. In the final settlement between Davis, Phillips and Micou, we find no complaint from Micou. He was not only shielded in the suit, but he remained absolutely silent.

As all the stock of the company was to be taken for enough money from the syndicate to pay for the property and as the syndicate paid enough for the purpose the company has suffered not one bit. So far as it is concerned, it made no difference whether the property cost $20,000 or $100,000. The syndicate paid on its stock what the contract, or syndicate agreement called for. The plaintiff corporation was not injured, if Davis and Phillips did deceive Reid, one of the parties to the syndicate agreement, and got him to pay enough to cover his own as well as their part.

But if any judgment could be given in an action by the corporation which lost nothing, it could only be a several decree against Davis and a several decree against Phillips. For having left Herbert and Micou out of the action, it is unjust to hold Davis and Phillips jointly liable for the whole amount.

The forfeiture of $27,000 of stock in the hands of Davis, is the grossest injustice. The stock, as we have seen, has become valuable.

Davis' part of the alleged secret profit (Printed record, p. 205), was one-half or $2,180.50, excluding the Sowers $1,333 and Micou $1,200. Instead of making him respond to this extent, he is penalized and punished to the extent of $27,000 in stock and $1,546.54 in money. Equity can restore what is wrongly taken, but cannot punish or penalize. For every bit of this stock there was paid for the company's benefit, the same that was paid for any of the rest of its stock. It was not hurt, if Davis, and Phillips, and Herbert and Macou got out of Reid enough

to pay for his and theirs too. If plaintiff could sue at all, it would not leave out Herbert and Micou, and sue Davis and Phillips only, and yet recover jointly. It must sue all jointly, or suing a part of the alleged wrong-doers, it can only recover severally.

As Mr. Thompson in his work on Corporations says, Sec. 465:

> "The measure of recovery in Equity is only the net secret profit of the promoter."

It will, indeed, be a remarkable equity which takes from Davis $27,000 of stock, a part being what he originally subscribed for and the balance that he bought from Phillips, and Herbert and Micou, and let Reid keep what he bought from Phillips and Herbert and Micou, and let Herbert share in the cancellation on the $9,000 of stock he still holds, at not one cent of cost.

No method of cancelling stock, because it was partly paid for by money gotten from Reid, a member of the syndicate, can result in anything but injustice. In addition, it will give back to plaintiff something it has no interest in, as a corporation; for it agreed to give all its stock for the property, the syndicate being required to pay enough on the stock to pay for the property. This the syndicate did, and if they wronged each other, there may be an action by the individuals, but there is nothing for the plaintiff corporation to sue for. It cannot be used by Reid for any such purpose.

The trial Court, after citing several cases, (Printed record, p. 229), none of which were like the case at bar, where the syndicate, organizers, or promoters, or whatever they may be called, took all the stock, but all of them being cases where a number of subscribers to stock were gotten outside the syndicate originally form-

ing the company, and all of which cited cases are directly contrary to the later decision of the Supreme Court, cited above, says:

> "The principles laid down in these cases establish the liability of the defendants to account to the plaintiff for the undisclosed profits which *each* received in this transaction. And inasmuch as it appears from the testimony that these profits were at least in part, invested in the stock of plaintiff, under the decision in the case of Yeiser *vs.* U. S., Board & Paper Co., supra, (107 Fed., 340), it would appear equitable that to the extent that such illegal profits entered into the purchase of said stock, the latter should be turned in and cancelled by the company."

The fundamental error the learned Judge fell into, was an utter misunderstanding of the real transaction.

He failed to notice that the secret profits, if any were taken, were not taken from the plaintiff, but entirely from Reid, a member of the syndicate that formed the company. That if there was any injury done, it was not done to the plaintiff corporation, but individually to Reid, so that if there was any ground for action, it belonged to Reid as an individual, and not to the corporation. That Reid, Davis, and Phillips, and Herbert and Micou, (partners), were all promoters, and together formed a syndicate that created the plaintiff corporation, no one can deny. By virtue of the syndicate agreement they took all the stock. There were no subscribers to stock outside of the syndicate. (Davis afterwards sold six shares to Sowers, but the plaintiff had no interest in this, it was personal between Sowers and Davis.)

The learned Judge himself admits all this, saying, (Printed record, p. 30):

> "At the time the final agreement and subscription was made, March 19th, 1904, the understanding was that Phillips, Davis, Reid, and Herbert and Micou, (partners), were to turn over the land to the company for $34,000. * * * In this respect, all these parties were promoters." See contract (P. R., pp. 90-91.)

These promoters then agreed to form a company and turn the property over to it. They agreed to take all its stock and to pay enough therefor to pay for the property. As the company gave all its stock and the promoters were to pay enough thereon, and no more than enough, to pay for the property and $5,000 for expenses, it had no interest in, nor was it in any way affected by any deceit, practiced by any of the promoters amongst themselves. The plaintiff corporation got exactly what was agreed it should get, viz., the property. It gave exactly what was agreed it should give, viz., all its stock. It was not defrauded. There were no other subscribers to its stock.

By what process of reasoning can it then sue for an injury never done it? Or for other subscribers to its stock, outside the promoters, when there were none?

How can the corporation, by any legal fiction, be used to recover, because of the claim that Davis, Phillips, and Herbert and Micou, deceived Reid, and out of the money contributed by him, paid for their stock?

How can the corporation have stock held by Davis cancelled, when it expressly agreed that all its stock should go to the promoters, or syndicate, it to receive the property, which it did receive; and the syndicate, subscribers to all its stock, to pay enough therefor to buy the property and provide $5,000 expense, which they did?

If Reid, a promoter, was deceived by the other promoters, and paid more than he really ought to have paid,

it was simply an individual matter, between him and them.

The case of Yeiser *vs.* U. S. Board & Paper Company, alone relied on by the Judge, for the cancellation of stock, is not like the present case.

In that case, there were a number of *subsequent subscribers* to stock, who were induced to subscribe on a false prospectus issued by the promoters. The promoters subscribed for $25,000 of stock, and when the subsequent subscribers, brought in under the fraudulent prospectus, paid in, on their subscriptions, the corporation gave the promoters $65,000 to pay for the property. They paid $45,000 for the property and paid the other $25,000 for their stock. The company was allowed to sue for these subsequent stockholders and the stock was cancelled.

The case at bar is simply an attempt to use the corporation to recover what one member of a syndicate claims he was defrauded of by other members.

Such suit cannot be maintained.

> Old Dominion Copper Co. *vs.* Lewisohn, 210 U. S., 206, (1908), *supra.*

Another, though minor, error committed was in cancelling 27 shares held by Davis. Three of these shares of $3,000 par value, were a part of the $60,000 non-assessable stock, openly shared by all four promoters, in equal part, and even the Court below held that these were all good.

There is not the least question about these three shares, being a part of the $60,000, or non-assessable stock. These three shares Davis purchased of Micou. Davis testified positively that they were non-assessable (Printed record, p. 100).

Reid, the secretary and treasurer of the plaintiff, and the real prosecutor of this suit, was called in rebuttal of Davis, and contradicted Davis in several particulars, but did not contradict him as to this. Reid had the books and knew that Davis was correct as to these three shares. After Davis had all the stock bought by him transferred by Reid on the books of the Company, he receives a receipt from Reid for his assessment on all of his assessable stock, viz., 23 shares. (Printed record, p. 97.) This shows conclusively that certainly only 24 shares were assessable, or forfeitable under the Court's decision.

The last error to which attention will be called, is that, of the 27 shares, decreed to be cancelled, not only were the above 3 shares not subject to cancellation, but 8 other shares of the par value of $8,000, which were bought by Davis from Micou, or Herbert and Micou, could not possibly be cancelled. There is no dispute that Davis, Phillips, and Herbert and Micou were partners under a written agreement (Printed record, p. 226), and that afterwards Reid joined with them and formed a syndicate to get up the corporation (Printed record, pp. 90, 91), the whole stock of which they subscribed for. The plaintiff did not make Herbert and Micou parties defendant, as it should have done, and did not call upon them for any responsibility, as it did from Davis and Phillips. Having refused to make Herbert and Micou parties, it certainly cannot attack, or ask any remedy as to the stock received by Herbert and Micou, 8 shares of which were purchased by Davis. Plaintiff having sought to let out Herbert and Micou, who were, legally, equally guilty as Davis and Phillips, if there was any wrong, cannot attack the stock Davis bought from Herbert and Micou. It is well settled that parties cannot take inconsistent positions in legal proceedings.

Am. and Eng. Enc. of Law, Vol. 7, p. 22.
Shattuck *vs.* Smith, 16 Vol., p. 132.
Littel *vs.* Julius Lansburgh Furniture Co., 96 Va., 540.

If any stock then could be cancelled, the above three shares and eight shares must be deducted, leaving in Davis only sixteen shares that could possibly be cancelled.

Conclusion.

It is submitted—

1st. The suit was not legally authorized.

2nd. The suit cannot be maintained by the plaintiff corporation, the deceit alleged to have been practiced on Reid being personal between him and the other members of the syndicate, and in no way was plaintiff injured.

3rd. If such a suit could be maintained, Herbert and Micou are necessary parties to prevent gross injustice to Davis, and plaintiff, having refused to make them parties, the suit must be dismissed.

4th. That, under all the circumstances of this case, a cancellation of stock is unjust and inequitable, puts a terrible penalty on Davis, and not only lets his partners, Herbert and Micou escape, but will actually increase the value of the stock held by Herbert. That as the action is against a part only, the recovery, if any, can only be against Davis for the money received by him, outside of what was received from Sowers or Micou, viz., $2,180.50, and against Phillips for a like amount.

5th. That if any stock held by Davis could be equitably cancelled, it could certainly only be as to sixteen shares.

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